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Supreme Court, U.S.
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In the
Supreme Court of the United States

FEDERAL KEMPER LIFE ASSURANCE COMPANY
Petitioner,

v.

KAKKADASAN SAMPATHACHAR, M.D.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a special verdict under Rule 49(a) of the Federal Rules of Civil Procedure must contain jury findings on all issues of material fact raised by the pleadings and the evidence when a party demands the submission of those issues to the jury.

PARTIES TO THE PROCEEDING AND STATEMENT UNDER RULE 29.6

The petitioner is Federal Kemper Life Assurance Company. The respondent is Dr. Kakkadasan Sampathachar.

Federal Kemper Life Assurance Company, now known as Chase Insurance Life and Annuity Company, is a wholly owned subsidiary of Protective Life Insurance Company, which is a wholly owned subsidiary of Protective Life Corporation. Protective Life Corporation is a publicly traded company. No publicly held company owns ten percent or more of Protective Life Corporation's stock.

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PETITION FOR A WRIT OF CERTIORARI

Federal Kemper Life Assurance Company ("Federal Kemper") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS AND ORDERS BELOW

The order of the district court sustaining plaintiff's objection to defendant's proposed special verdict slip (App., *infra*, 18a-19a) is unreported. The judgment of the district court (App., *infra*, 12a-13a) is unreported. The opinion of the court of appeals affirming the judgment of the district court (App., *infra*, 1a-9a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 16, 2006. App., *infra*, 10a-11a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

This case involves the construction and interpretation of Rule 49(a) of the Federal Rules of Civil Procedure, which provides as follows:

> **Special Verdicts.** The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives the right to a trial by jury of the issue so omitted unless before the jury retires the party demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do

> so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

Fed. R. Civ. P. 49(a).

STATEMENT OF THE CASE

Kakkadasan Sampathachar ("Dr. Sampathachar"), filed suit against Federal Kemper seeking to recover death benefits allegedly due under a life insurance policy insuring the life of his wife, Pannathpur Jayalakshmi Sampathachar, M.D. ("Mrs. Sampathachar" or "the Insured"). Dr. Sampathachar claimed his wife drowned in the Ganges River after disappearing from their home in rural India.

Dr. Sampathachar's entire case was premised on his contention that a corpse found in the Ganges River on November 6, 2001, was his wife's body. The body Dr. Sampathachar allegedly identified as his wife, however, had certain anatomical features that conflicted with his wife's medical and dental records. Federal Kemper's defense was based on evidence that the body was not the Insured's and, therefore, Dr. Sampathachar had no proof his wife was dead.

Given the anatomical differences between the body retrieved from the Ganges River and the Insured, Federal Kemper requested that the special verdict include a question requiring the jury to determine whether the body retrieved from the Ganges River on November 6, 2001, was that of the Insured. The district court refused to submit that question to the jury. In doing so, the district court essentially nullified Federal Kemper's right to a jury trial by removing from the jury's consideration the disputed issue of fact around which the entire defense was constructed. After a ten-day trial, the

jury returned a verdict in favor of Dr. Sampathachar on his breach of contract claim.[1]

This case presents a question of recurring importance that is pertinent to all federal civil jury trials in which a special verdict form is used: whether Rule 49(a) of the Federal Rules of Civil Procedure requires that a special verdict include findings on all issues of material fact when such findings are specifically requested by a party.

I. Factual Background

Between 1995 and 1999, Mrs. Sampathachar obtained $10.5 million in life insurance from seven different insurance companies. Dr. Sampathachar was the designated beneficiary on each of the policies acquired by Mrs. Sampathachar. One of the policies, a $1 million term life insurance policy, was issued by Federal Kemper.

In April 2001, the Sampathachars left the United States and traveled to Bangalore, India. Although Dr. Sampathachar claimed they only intended to visit India for 6-12 months and planned to return to the United States, the Sampathachars ceased making mortgage payments on their Philadelphia residence, and their home of twenty years went into foreclosure. C.A. App. 2436-37.

According to Dr. Sampathachar, Mrs. Sampathachar mysteriously walked out of their rural home near Bangalore at 4:30 in the morning on October 17, 2001, taking nothing

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[1] Dr. Sampathachar alleged claims for breach of contract and bad faith against Federal Kemper. The jury found in favor of Federal Kemper on the bad faith claim.

but the clothes she was wearing. On October 28, 2001, Dr. Sampathachar learned from the police that his wife had checked into a hotel in Devaprayag, a remote village in northern India approximately 2,500 kilometers from their home.

On November 2, 2001, Dr. Sampathachar's nephew Pannathpur Raghavendra ("Mr. Raghavendra") traveled to Devaprayag to search for his aunt. After searching for several days without success, Mr. Raghavendra decided to search the Ganges River. C.A. App. 2995.

On November 6, 2001, Mr. Raghavendra reported that his aunt's body was discovered in the Ganges River. C.A. App. 2128, 2998-3000. Although the body was partly decomposed and bloated, C.A. App. 3077-78, Mr. Raghavendra identified the body as his aunt's. The body was taken to a hospital for a postmortem examination.

Dr. Sampathachar traveled overnight to the morgue where the body was kept. C.A. App. 2130-32. Based on a visual inspection of the decomposing and bloated corpse, Dr. Sampathachar also identified the body as his wife's. C.A. App. 2136-37.

A postmortem examination was performed by Dr. S.D. Saklani. One of the reasons Dr. Sampathachar claims he was able to identify the body was because Dr. Saklani's postmortem examination revealed the body had no uterus. C.A. App. 2140-41. According to Dr. Sampathachar, his wife had an abdominal hysterectomy that involved the removal of the uterus, left-side ovary, and left-side fallopian tube. C.A. App. 2045-46, 2250-51. This was confirmed by her medical records. C.A. App. 5465.

Dr. Saklani testified that the ovaries and fallopian tubes were present in the body he examined. C.A. App. 3953. If the body had both fallopian tubes and ovaries, then the body could not have been Mrs. Sampathachar's. Dr. Sampathachar further testified that his wife had a six-inch vertical scar on her lower abdomen. C.A. App. 2250. Dr. Saklani did not find a scar on the abdomen of the body. C.A. App. 3952-53, 5506-08 (Postmortem Report).

Dr. Saklani's postmortem report further noted that the body had four teeth missing in the upper jaw, but none missing in the lower jaw. C.A. App. 3949-51, 5507. This was significant because Mrs. Sampathachar's dental records confirmed she was missing both wisdom teeth in the lower jaw. C.A. App. 3209, 5475 (Dental Record). The presence of wisdom teeth in the lower jaw of the body means the body could not have been Mrs. Sampathachar's.

After the postmortem examination was completed, the body was released to Dr. Sampathachar and the body was immediately cremated. On November 16, 2001, Dr. Sampathachar called Federal Kemper and reported that his wife had died. C.A. App. 2830. After completing its investigation, Federal Kemper denied Dr. Sampathachar's claim for lack of due proof of death.

II. Proceedings In The District Court

Dr. Sampathachar, claiming to be a resident of Pennsylvania, sued Federal Kemper in the Pennsylvania Court of Common Pleas of Philadelphia County. Federal Kemper removed the action to the United States District Court for the Eastern District of Pennsylvania pursuant to 28 U.S.C. § 1441. The district court retained jurisdiction pursuant to 28 U.S.C. § 1332.

In the amended complaint, Dr. Sampathachar alleged that Mrs. Sampathachar died by drowning in the Ganges River on November 7, 2001, and he attached a copy of the death certificate issued for the body retrieved from the Ganges River and purportedly identified as Mrs. Sampathachar's. C.A. App. 49, 54-55.

At trial, Dr. Sampathachar maintained that the body retrieved from the Ganges River was that of Mrs. Sampathachar. Federal Kemper defended against this allegation by presenting medical and dental evidence through two expert witnesses tending to show the body could not have been the body of the Insured. In rebuttal, Dr. Sampathachar called two expert witnesses to challenge the accuracy of Dr. Saklani's post-mortem findings. Without question, the identification of the body was the ultimate issue in dispute at trial. Indeed, the body retrieved from the Ganges River on November 6, 2001, provided the entire basis for Dr. Sampathachar's claim that (1) the Insured was dead, and (2) the Insured died while the policy was in force.[2]

In light of the material dispute of fact concerning the identification of the body, Federal Kemper requested inclusion of the following interrogatory in the special verdict slip:

> Do you find that Kakkadasan Sampathachar has proved by a preponderance of the evidence that the body retrieved from the Ganges River

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[2] Dr. Sampathachar stopped paying insurance premiums after Mrs. Sampathachar disappeared. If Mrs. Sampathachar died when the policy was not in force, then Federal Kemper would have no obligation to pay benefits under the policy.

> on November 6, 2001, was his wife, Pannathpur Sampathachar?
>
> Yes _____ No _____

C.A. App. 1578. Dr. Sampathachar objected to this proposed interrogatory, arguing that he did not have to prove the body was the Insured's. C.A. App. 1583. The district court sustained Dr. Sampathachar's objection, and instead submitted plaintiff's proposed interrogatory to the jury, which read as follows:

> Do you find by a preponderance of the evidence that Pannathpur Jayalakshmi Sampathachar is dead?
>
> _____ Yes _____ No

App., *infra*, 14a. The jury, therefore, was permitted to find the Insured was dead without resolving whether the body retrieved from the Ganges River was the Insured's body.

Federal Kemper also requested that the jury be instructed that it must find that the body was Mrs. Sampathachar's in order to find that she is dead. Federal Kemper proposed the following jury instruction:

> Dr. Sampathachar contends the body recovered from the Ganges River on November 6, 2001, was that of his wife, Pannathpur Sampathachar. Federal Kemper and American General contend that Dr. Sampathachar is not entitled to recover under the policies because the dental and

> medical evidence proves the body is not that of Pannathpur Sampathachar.
>
> Dr. Sampthachar bears the burden of proof on this issue, which means he must prove by a "preponderance of the evidence" that the body recovered from the Ganges River on November 6, 2001, was his wife's body.
>
> If you find that Dr. Sampathachar did not meet his burden of proving by a prepondérance of the evidence that the body retrieved from the Ganges River was Mrs. Sampathachar, then you must find for the defendants, Federal Kemper and American General.[3]

C.A. App. 1556-57. Dr. Sampathachar objected to this proposed instruction, again arguing that he did not have to prove the body was the Insured's. C.A. App. 1946. The district court sustained plaintiff's objection and declined to give Federal Kemper's proposed jury instruction. C.A. App. 28.

In essence, the district court's rulings nullified Federal Kemper's defense and removed from the jury's consideration the issue of whether the body was Mrs. Sampathachar's. The jury returned a special verdict finding that Mrs. Sampathachar was dead. Based on the jury's special verdict, the district court entered a judgment against Federal Kemper on plaintiff's breach of contract claim in the amount of $1 million. App., *infra*, 12a-13a.

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[3] American General Life Insurance Company was a co-defendant at trial, but settled with plaintiff prior to the jury's verdict.

On June 21, 2005, the district court denied Federal Kemper's post-trial motion to alter or amend the judgment and for judgment as a matter of law. C.A. App. 31. On July 13, 2005, Federal Kemper filed a timely notice of appeal. C.A. App. 21-23.

III. Proceedings In The Court Of Appeals

On appeal, Federal Kemper argued that Federal Rule of Civil Procedure 49(a) required the district court to submit an interrogatory to the jury asking whether the body retrieved from the Ganges River on November 6, 2001, was that of Mrs. Sampathachar.

In an opinion filed June 16, 2006, without citing or discussing Rule 49(a), the court of appeals affirmed the district court judgment. App., *infra*, 1a-9a. The opinion, however, included the following footnote:

> Moreover, given that plaintiff's case at trial rested entirely on evidence that Mrs. Sampathachar drowned in the Ganges River and that the body pulled from the river was hers, we can reasonably assume, based on the jury's verdict, that the jury concluded that the body pulled from the river was in fact Mrs. Sampathachar's body.

App., *infra*, 6a. The court of appeals thus acknowledged that plaintiff's alleged identification of the body was the key factual issue underlying the entire controversy. Nevertheless, the court of appeals "assumed" the jury found the body was Mrs. Sampathachar's—a question the district court refused to submit to the jury. No authority supports the appellate court's assumption. To the contrary, the jury was required to make

findings on all issues of material fact pursuant to the binding precedents from this Court and in accordance with the provisions of Rule 49(a).

REASONS FOR GRANTING THE PETITION

Nearly two centuries ago, this Court made clear that a special verdict must include findings on all issues of material fact. If a special verdict contained no express finding on a material issue of fact, then the verdict was insufficient to sustain the entry of judgment.

The adoption of Rule 49(a) as part of the Federal Rules of Civil Procedure modified the common law rules governing the use of special verdicts. Under Rule 49(a), if a material issue of fact is omitted from the special verdict slip, and no party demands its submission to the jury, then the parties are deemed to have waived the right to a jury trial on that issue.

Since the adoption of the Rules of Civil Procedure, this Court has not addressed its nineteenth-century precedent in light of Rule 49(a) or otherwise addressed the findings required to sustain a modern special verdict when waiver is not an issue.

This case presents an opportunity for the Court to construe Rule 49(a) and affirm the continuing vitality of the Court's nineteenth century precedent requiring findings on all issues of material fact when a party demands the submission of those issues to the jury. Moreover, this case calls for an exercise of the Court's supervisory powers to protect the constitutional right to a jury trial and overrule the Third Circuit's decision sanctioning a district court ruling that completely departed from the accepted and usual course of judicial proceedings by

removing the determinative issue of fact from the jury's consideration.

I. Rule 49(a) Should Be Construed To Require Special Verdicts To Include Findings On All Issues Of Material Fact When A Party Demands The Submission Of Those Issues To The Jury

At common law, a special verdict was simply a statement of the facts found by the jury. Sir William Blackstone explained the procedure this way:

> And herein they state the naked facts, as they find them to be proved, and pray the advice of the court thereon, concluding conditionally that if upon the whole matter the court shall be of opinion that the plaintiff had cause of action, they then find for the plaintiff; if otherwise, then for the defendant. This is entered at length on the record, and afterwards argued and determined in the court at Westminster, from whence the issue came to be tried.

William Blackstone, 3 Commentaries *377. This procedure necessarily required the jury to render findings on all issues of material fact or the verdict would be legally ineffectual. *See* Prentice H. Marshall, 9 Moore's Federal Practice § 49.10 (2004) [hereinafter Moore's Federal Practice] (explaining limitations on special verdicts at common law); Hon. John R. Brown, Federal Special Verdicts: The Doubt Eliminator, 44 F.R.D. 338, 349 (1968) (discussing pitfalls of special verdicts under common law).

In the early nineteenth century, the Supreme Court incorporated this common law rule into American law:

> Whether the jury find a general or a special verdict, it is their duty to decide the very point in issue ... if it appears to that court or to the appellate court that the finding is different from the issue, or is confined to a part only of the matter in issue, no judgment can be rendered upon the verdict.

Patterson v. United States, 15 U.S. 221, 225 (1817).

Regardless of the evidence presented, a court could not simply assume the jury made a finding when the finding was not expressly made. *See Barnes v. Williams*, 24 U.S. 415, 416 (1826). "Where a special verdict is rendered all the facts essential to entitle a party to a judgment must be found, and a judgment rendered on a special verdict failing to find all the essential facts is erroneous." *Ward v. Cochran*, 150 U.S. 597, 608 (1893).

A judgment would be reversed regardless of the evidence that might support it unless an express finding on every material fact was included in the special verdict. *See Barnes*, 24 U.S. at 416-17 (reversing judgment and awarding new trial where evidence may have supported an essential factual finding, but jury did not make the necessary finding). Even in a case where the special verdict expressly acknowledged the evidence supporting a conclusion, but did not actually state the conclusion, the judgment on the verdict could not be sustained:

> Although, in the opinion of the Court, there was sufficient evidence in the special verdict

> from which the jury might have found the fact, yet they have not found it, and the Court could not, upon a special verdict, intend it. The special verdict was defective in stating the evidence of the fact, instead of the fact itself. It was impossible, therefore, that a judgment could be pronounced for the plaintiff.

Id. at 416; *see also Hodges v. Easton*, 106 U.S. 408, 411-12 (1882) (refusing to assume judgment was supported by facts not found in jury verdict slip where jury verdict did not expressly make factual findings).

This common law rule was well settled and repeatedly upheld by the Supreme Court. Indeed, shortly before the Federal Rules of Civil Procedure became effective, the Court observed that "a judgment upon a special verdict cannot be sustained unless the findings extend to all material issues." *United States v. Esnault-Pelterie*, 299 U.S. 201, 205 (1936) (vacating judgment for plaintiff in patent infringement suit where trial court failed to make specific finding on validity of patent). Shortly before the enactment of the Federal Rules of Civil Procedure in 1937, this line of Supreme Court cases ended.

Rule 49(a) modified the use of special verdicts by addressing the limitations on special verdict practice that had existed at common law. *See* 9 Moore's Federal Practice § 49.10. A district court is now permitted to "make a finding" on any material fact that is omitted from the special verdict slip absent a party's demand for its submission. *See* Fed. R. Civ. P. 49(a) ("[E]ach party waives the right to a trial by jury of the issue so omitted unless before the jury retires the party demands its submission to the jury."). Even if the trial court fails to make an express finding, "it shall be

deemed to have made a finding in accord with the judgment on the special verdict." *Id.*

These changes to the common law relieved the district court from the burden of ensuring that all facts material to the judgment are found by the jury and have, as one commentator noted, "revitalized the special verdict." 9 Moore's Federal Practice § 49.10. Indeed, in some circuits the modern special verdict is the preferred method for jury verdicts in certain cases. *See, e.g., Structural Rubber Prods. Co. v. Park Rubber Co.*, 749 F.2d 707, 723-24 (Fed. Cir. 1984) (stating preference for use of special verdicts in certain patent cases); *Envirex, Inc. v. Ecological Recovery Assocs., Inc.*, 454 F. Supp. 1329, 1339-40 (M.D. Pa. 1978) (noting preference for use of special verdicts in complex cases), *aff'd without op.*, 601 F.2d 574 (3d Cir. 1979).

Rule 49(a), however, leaves at least one issue unresolved. Although the parties clearly waive the right to a jury finding on any issue of material fact intentionally or inadvertently omitted from the special verdict, Rule 49(a) does not address the situation when a party specifically demands the submission of an issue of material fact to the jury and the court refuses to include the question on the special verdict slip. Under such circumstances, a special verdict that does not contain findings on all issues of material fact would seem to violate the long-standing common law precedents established by this Court before the adoption of Rule 49(a).

A fact is "material" if, under the governing law, it would affect the outcome of the lawsuit. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Napier v. F/V Deesie, Inc.*, 454 F.3d 61, 66 (1st Cir. 2006); *Zamora v. Elite Logistics, Inc.*, 449 F.3d 1106, 1112 (10th Cir. 2006); *Justofin v. Metro. Life Ins. Co.*, 372 F.3d 517, 521 (3d Cir.

2004); *see also Hodges v. Easton*, 106 U.S. 408, 412 (1882) (referring to material facts as "all the facts essential to a recovery"). Modern decisions in the lower courts generally apply the common law standards enunciated by this Court and require that all "material" issues of fact be submitted to the jury in a special verdict pursuant to Rule 49(a). *See, e.g., Wheeler v. John Deere Co.*, 935 F.2d 1090, 1101 (10th Cir. 1991) ("Once a trial court elects to use such interrogatories on a given element of a plaintiff's claim, all material issues must be included in the interrogatories."); *U.S. Fire Ins. Co. v. Pressed Steel Tank Co.*, 852 F.2d 313, 318 (7th Cir. 1988) ("Rule 49(a) requires a district court to submit all material issues raised by the pleadings and evidence."); *Sakamoto v. N.A.B. Trucking Co.*, 717 F.2d 1000, 1005 (6th Cir. 1983) ("A Rule 49(a) special verdict is designed to cover all of the material factual issues in the cases."); *Simien v. S.S. Kresge Co.*, 566 F.2d 551, 555 (5th Cir. 1978) ("Once the decision is made to submit the case on special interrogatories, the judge must submit all material issues raised by the pleadings and the evidence.").

Some courts hold that a special verdict need only contain interrogatories directed toward the "ultimate" conclusions of fact in the case. *See, e.g., Local 159 v. Nor-Cal Plumbing, Inc.*, Nos. 96-16172 & 96-16284, 1999 U.S. App. LEXIS 17968, at *36 (9th Cir. July 27, 1999); *Austin-Westshore Constr. Co. v. Federated Dept. Stores, Inc.*, 934 F.2d 1217, 1221 (11th Cir. 1991) ("'Today, under the special verdict system, the jury makes formal findings on issues of ultimate fact and the court applies the law.'") (quoting *Portage II v. Bryant Petroleum Corp.*, 899 F.2d 1514, 1520 (6th Cir. 1990)); *Travelers Ins. Co. v. Truitt*, 280 F.2d 784, 789 (5th Cir. 1960). A judgment cannot stand, however, when a jury's factual findings lack the requisite elements to sustain a claim. *See Chemetron Corp. v. Bus. Funds, Inc.*, 682 F.2d

1149, 1171-72 (5th Cir. 1982) (reversing judgment entered pursuant to special verdict where jury found fraudulent non-disclosure but made no finding regarding the confidential relationship that would be necessary to create duty to disclose).

The Third Circuit's decision in the present case represents a significant departure from the common law and statutory rules of special verdict practice. Although the Third Circuit acknowledged that "plaintiff's case at trial rested entirely on evidence that Mrs. Sampathachar drowned in the Ganges River *and that the body pulled from the river was hers*," (App., *infra*, 6a (emphasis added)), the court nevertheless affirmed the district court decision refusing to require the jury to determine whether the body found in the Ganges River was that of Mrs. Sampathachar. App., *infra*, 5a-6a. The court of appeals concluded it could "reasonably assume" the jury found the body pulled from the river was Mrs. Sampathachar's. App., *infra*, 6a.

This is precisely the kind of guesswork barred by the common law. A court cannot "assume" the jury made a finding not expressly stated in the special verdict. *See Hodges*, 106 U.S. at 411-12; *Barnes*, 24 U.S. at 416. This Court should construe Rule 49(a) to require special verdicts to include findings on all issues of material fact, as required by the common law, when a party demands the submission of those issues to the jury.

II. This Court Should Exercise Its Supervisory Powers To Protect The Right To Trial By Jury

Nothing in the text of Rule 49(a) purports to abrogate the right of a party to have a jury determine all issues of material fact, provided the party demands their submission to the jury. *See* Fed. R. Civ. P. 49(a). Unless and until this Court chooses to change or abolish this common law principle, or it is modified by a statute that expresses a clear intention to change the common law, it remains the law of the land. *See, e.g., Tenet v. Doe*, 544 U.S. 1, 11 (2005) (reversing court of appeals for failure to follow *Totten v. United States*, 92 U.S. 105 (1876)); *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952) ("Statutes which invade the common law ... are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident."). Here, Rule 49(a) did not change the common law requirement that special verdicts contain findings on all issues of material fact, except to the extent the parties "waive" the submission of such issues to the jury.

The court of appeals' opinion in this matter departed from a line of decisions that dates back nearly two centuries. There is no authority under the common law or under the Federal Rules of Civil Procedure supporting the decision to assume the jury made factual findings that it was specifically precluded from making. Indeed, the court of appeals has sanctioned a departure from the accepted and usual course of

judicial proceedings that calls for an exercise of this Court's supervisory powers. *See* Sup. Ct. R. 10(a).[4]

The failure of the district court to require the jury to determine whether the body retrieved from the Ganges River was the Insured deprived Federal Kemper of its Seventh Amendment right to have each issue of material fact decided by a jury. The Seventh Amendment preserves the right to jury trial as it existed when the Bill of Rights was adopted in 1791. *See* U.S. Const. amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved ...."); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 333 (1979) ("'[The] thrust of the [Seventh] Amendment was to preserve the right to jury trial as it existed in 1791.'") (quoting *Curtis v. Loether*, 415 U.S. 189, 193 (1974) (alterations in original)). Thus, actions that would have been tried by jury at common law, such as an action for breach of contract, are still tried before a jury today. *See Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 459 (1977) (giving "suits for damages for breach of

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[4] Although the court of appeals' opinion was designated "non-precedential," that fact is not a legitimate basis for ignoring governing law. *See Symbol Techs., Inc. v. Lemelson Med., Educ. & Research Found.*, 277 F.3d 1361, 1368 (Fed. Cir. 2002). Moreover, the Third Circuit has no rule prohibiting the citation of non-precedential opinions. Indeed, district courts in the Third Circuit and elsewhere often rely upon unpublished and non-precedential opinions of the Third Circuit. *See, e.g., In re Diet Drugs Prods. Liab. Litig.*, 434 F. Supp. 2d 323, 332 n.8 (E.D. Pa. 2006) (noting non-precedential opinions of the Third Circuit are persuasive authority); *Cont'l Cas. Co. v. Fifth/Third Bank*, 418 F. Supp. 2d 964, 975 (N.D. Ohio 2006) (describing unpublished Third Circuit decisions as persuasive authority).

contract" as example of suits in which Seventh Amendment right to trial by jury applies); William Blackstone, 3 Commentaries *156 (explaining that in action for breach of contract, jury would award damages in proportion to injury sustained by plaintiff and as occasioned by defendant's breach).

In a breach of contract action, the facts concerning the breach must be determined by the jury. *See Atlas Roofing Co.*, 430 U.S. at 459 (stating "issues of the making of the contract and its breach" were to be determined by jury, as preserved by the Seventh Amendment). This right, however, was violated by the district court's failure to submit Federal Kemper's proposed verdict interrogatory. *See Hodges*, 106 U.S. at 412 ("It was the province of the jury to pass upon the issues of fact, and the right of the defendants to have this done was secured by the Constitution of the United States."). As a result, judgment was entered without the jury determining the identity of the body.

In its opinion, the Third Circuit did not determine that the identity of the body was not a material fact. Rather, the Third Circuit assumed the jury must have found the body was Mrs. Sampathachar's because it found she was dead. Finding that Mrs. Sampathachar is dead, however, is not the same as finding that the body was Mrs. Sampathachar's. If the jury had expressly found the body removed from the Ganges River was Mrs. Sampathachar's, then logic would sustain the conclusion that Mrs. Sampathachar is dead. The jury, however, was limited to finding that Mrs. Sampathachar was dead and logic cannot support the assumption that the jury

found the body was Mrs. Sampathachar's.[5] Once the jury failed to expressly find the body was Mrs. Sampathachar's, as required by Rule 49(a), the court of appeals had no authority to usurp the jury's fact-finding function.

Moreover, the question of whether Mrs. Sampathachar died while the policy was in force was never answered by the jury. The jury, for example, could have decided the body was not the Insured's, but believed she died some time within the past few years because (a) she had not been heard from in more than three years, and (b) the insurance companies' investigator was unable to locate her. If, however, the body retrieved from the Ganges River on November 6, 2001, was not the Insured's body, and the Insured did not die while the policy was in force, then there was no breach of contract.

The court of appeals erred by affirming the district court's departure from this Court's precedents and Rule 49(a). The result of this error nullified Federal Kemper's defense and violated its Seventh Amendment right to have the controlling issue of fact determined by a jury.

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[5] The assumption that the jury must have found the body was Mrs. Sampathachar's because it found she "is dead" exemplifies the logical fallacy known as "affirming the consequent." "Affirming the consequent" means to fallaciously assume the converse of a statement is true. *See Stewart Foods, Inc. v. Broecker*, 64 F.3d 141, 145 n.3 (4th Cir. 1995); Irving M. Copi & Carl Cohen, Introduction to Logic 240-41 (8th ed. 1990).

CONCLUSION

For all of these reasons, Federal Kemper respectfully requests that its petition for a writ of certiorari be granted.

Respectfully submitted.

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September 2006

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 05-3433

[Filed June 16, 2006]

KAKKADASAN SAMPATHACHAR)
)
v.)
)
FEDERAL KEMPER LIFE)
ASSURANCE COMPANY,)
Appellant.)

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
District Court Judge: The Honorable Juan R. Sanchez
(Civil. No. 03-05905)

Before: AMBRO, FUENTES, and GREENBERG, Circuit Judges.

OPINION

FUENTES, Circuit Judge.

Plaintiff Kakkadasan Sampathachar initiated this action asserting breach of contract and bad faith against defendant Federal Kemper Life Assurance Company when Federal Kemper refused to pay on a life insurance policy following the alleged drowning of plaintiff's wife, Pannathpur Jaylakshmi Sampathachar, in 2001. A jury trial was held, at which Federal Kemper attempted to establish that Mrs. Sampathachar was not dead. The jury found for plaintiff on the breach of contract claim, and Federal Kemper now appeals, asserting various errors by the District Court at trial. We find no errors meriting a new trial, and we therefore affirm.[1]

I. BACKGROUND

Because we write only for the parties, our summary of the facts is abbreviated. Plaintiff and his wife immigrated to Philadelphia from India in 1972. In the 1990's, Mrs. Sampathachar developed signs of depression in response to the death of her elderly mother and later the death of a young Indian guru whom she considered her spiritual advisor. Between 1995 and 1999, Mrs. Sampathachar secured $10.5 million in life insurance from seven different insurance companies. Among these was a $1 million policy from

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[1] This action was originally filed in state court and was removed by the defendant to the United States District Court for the Eastern District of Pennsylvania pursuant to 28 U.S.C. § 1441. The District Court had subject matter jurisdiction pursuant to 28 U.S.C. § 1332, and we have appellate jurisdiction pursuant to 28 U.S.C. § 1291.

Federal Kemper. That policy became incontestable in 1997, so that coverage could not be contested based on suicide or based on false statements in the application. According to Federal Kemper, Mrs. Sampathachar included material lies about her income and net worth in several of the applications for life insurance. In February 1997, the Sampathachars filed for bankruptcy.

In 2001, the Sampathachars moved from Philadelphia back to India. According to plaintiff, Mrs. Sampathachar unexpectedly left their home near Bangalore, India at 4:30 in the morning on October 17, 2001, carrying nothing except the clothes she was wearing. Plaintiff reported the disappearance to the police and offered a reward. On October 28, plaintiff was informed by the police that Mrs. Sampathachar had checked into a hotel in Devaprayag, India, a village on the Ganges River about 2500 kilometers from plaintiff's home. Plaintiff's relatives searched for Mrs. Sampathachar in Devaprayag, and when she could not be found, they hired rafters to search for her body in the Ganges River. A partially decomposed female body was discovered, and plaintiff's nephew identified the body as Mrs. Sampathachar. Plaintiff and his brother-in-law then traveled to Devaprayag and also identified the body.

A postmortem examination revealed that the body did not have a uterus, which was consistent with the fact that Mrs. Sampathachar had undergone a hysterectomy. Federal Kemper alleges, however, that the body did have ovaries and fallopian tubes and that there was no hysterectomy scar, and that these facts were not consistent with Mrs. Sampathachar's medical records. Federal Kemper also alleges that the dental information in the postmortem report was not consistent with Mrs. Sampathachar's dental records. Plaintiff had the body

cremated following the postmortem examination, and an Indian death certificate was obtained.

Federal Kemper now asserts that the District Court erred in (1) failing to require in the jury instructions and verdict sheet that the jury determine whether the body pulled from Ganges River was in fact Mrs. Sampathachar; (2) refusing to admit at trial tax returns, evidence related to prior bankruptcy proceedings, and financial misstatements by Mrs. Sampathachar in her applications for life insurance; and (3) admitting at trial the death certificate and expert testimony by a forensic dentist.

III. DISCUSSION

A. Identity of the Body Pulled From the River

Federal Kemper argues that under Pennsylvania law,[2] the jury instructions and the verdict form used at trial should have required the jury to specifically determine whether the body pulled from the Ganges River was that of Mrs. Sampathachar, rather than simply requiring the jury to determine whether Mrs. Sampathachar was dead.[3] We consider the legal correctness of jury instructions and verdict forms *de novo*.

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[2] The District Court concluded that Pennsylvania law was applicable to this case, and neither party appeals that finding here.

[3] On this point, the verdict form included the following interrogatory: (1) "Do you find by a preponderance of the evidence that Pannathpur Jaylakshmi Sampathachar is dead?" Federal Kemper proposed the following alternative: "Do you find that Kakkadasan Sampathachar has proven by a preponderance of the evidence that the body retrieved from the Ganges River on November 6, 2001 was his wife, Pannathpur Sampathachar?"

See United States v. Antico, 275 F.3d 245, 255 (3d Cir. 2001); *United States v. Stiger*, 413 F.3d 1185, 1190 (10th Cir. 2005).

Federal Kemper provides no support for its claim of error in the jury instructions and verdict form. A plaintiff asserting a breach of contract claim under Pennsylvania law must establish three elements: "(1) the existence of a contract, including its essential terms, (2) a breach of a duty imposed by the contract[,] and (3) resultant damages." *Ware v. Rodale Press, Inc.*, 322 F.3d 218, 225 (3d Cir. 2003) (citation and internal quotation marks omitted). Here, Federal Kemper did not dispute the existence of the contract and the applicable damages were not in question. The central issue at trial, then, was whether Federal Kemper breached its duty under the contract by failing to pay life insurance benefits to the plaintiff. Under the contract, payment was due only upon the death of the insured, and Federal Kemper based its defense on the assertion that Mrs. Sampathachar was not dead. Thus, plaintiff's burden was to prove to the jury by a preponderance of the evidence that Mrs. Sampathachar was dead.[4] This requirement was fully described to the jury in both the jury instructions and the verdict form. The District Court therefore did not err in refusing to require the jury to

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[4] Under the contract, plaintiff was also required to submit due proof of his wife's death to Federal Kemper, and the District Court separately asked the jury to determine whether this requirement was satisfied. The District Court's interrogatory and jury instructions on this point are not challenged here.

make a separate finding that the body found in the Ganges River was that of Mrs. Sampathachar.[5]

B. The District Court's Exclusion of Evidence

Next, Federal Kemper argues that the District Court erred at trial in excluding: (1) evidence of plaintiff's 1997 bankruptcy proceedings; (2) evidence of financial false statements made by Mrs. Sampathachar in her applications to other companies for life insurance; and (3) plaintiff's tax returns for 1997 and 1998, which were partially paid in 2000 and indicated that the Sampathachars were having financial difficulties. This Court reviews a District Court's decision to admit or exclude evidence for abuse of discretion. *In re Merritt Logan, Inc.*, 901 F.2d 349, 359 (3d Cir. 1990).

Under the Federal Rules of Evidence, evidence of a person's acts is not admissible "to prove the character of a person in order to show action in conformity there with," but may be admissible to prove motive or preparation, or the existence of a plan. Fed. R. Evid. 404(b). Evidence is not admissible unless it is relevant, meaning that it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401, 402. Relevant evidence may be excluded, however, if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay,

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[5] Moreover, given that plaintiff's case at trial rested entirely on evidence that Mrs. Sampathachar drowned in the Ganges River and that the body pulled from the river was hers, we can reasonably assume, based on the jury's verdict, that the jury concluded that the body pulled from the river was in fact Mrs. Sampathachar's body.

waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403.

Here, the excluded evidence did have some tendency to support Federal Kemper's allegation of a fraudulent scheme, suggesting that the Sampathachars were in financial trouble in the late 1990s and that Mrs. Sampathachar was taking pains to collect life insurance policies while hiding her financial problems. We note initially, however, that the use of bankruptcy evidence to indicate financial difficulties has been disapproved of by some courts. *See, e.g., United States v. Bensimon*, 172 F.3d 1121, 1129 (9th Cir. 1999); *United States v. Reed*, 700 F.2d 638, 642-43 (11th Cir. 1983). More significantly, all of the excluded evidence had a significant potential for improperly prejudicing the jury against the plaintiff and Mrs. Sampathachar. Nonetheless, the District Court did permit related evidence, including the number of policies Mrs. Sampathachar applied for and their dollar amounts, and financial information about the Sampathachars for the two years prior to Mrs. Sampathachar's death. We discern no error in regard to the excluded evidence.

Abuse of discretion is a highly deferential standard, under which we will reverse a District Court's finding as to the relative probative and prejudicial value of evidence only where the district court's "analysis and resulting conclusion [is] 'arbitrary or irrational.'" *United States v. Universal Rehabilitation Servs., Inc.*, 205 F.3d 657, 665 (3d Cir. 2000) (citation omitted). That requirement is clearly not met here, and we hold that the District Court did not abuse its discretion in excluding the evidence at issue.

C. The District Court's Admission of Evidence

Lastly, Federal Kemper argues that the District Court erred in admitting a death certificate from India, and in allowing the expert testimony of Dr. Linda Himmelberger, a forensic dentist. These admissions are reviewed for abuse of discretion. *Merritt Logan*, 901 F.2d at 359.

Federal Kemper asserts that the death certificate was not authenticated, as required by the Federal Rule of Evidence. Plaintiff argues that the admission was proper under Rule 901, which provides that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Fed. R. Evid. 901(a). That Rule also provides that, as to public records or reports, the admissibility requirement is satisfied by "[e]vidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office . . . is from the public office where items of this nature are kept." Rule 901(b)(7). In May 2004, a deposition was taken in India of Madhav Mewar Guru, who testified that he works in the Devaprayag town area committee, which maintains the official death records for the area. Guru stated that he issued the death certificate for Mrs. Sampathachar according to protocol. He noted that the executive officer is supposed to issue the certificate, but that when the executive officer is not present, he issues the certificate. Based on this evidence, the District Court did not abuse its discretion in admitting the death certificate.

As for the forensic dentist, Dr. Himmelberger testified at trial that a tooth count performed during the post-mortem examination of the body was not reliable, and also stated that there were certain similarities between the teeth in the post-

mortem photos and Mrs. Sampathachar's teeth as seen in her dental records. Federal Kemper argues that the District Court should have excluded Dr. Himmelberger's testimony under Federal Rule of Evidence 702. The Supreme Court has interpreted that rule to require the trial court to make a preliminary determination as to proffered expert testimony "whether the reasoning or methodology underlying the testimony is scientifically valid and [] whether that reasoning or methodology properly can be applied to the facts in issue." *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592-93, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). The District Court determined that Dr. Himmelberger's testimony was admissible under that standard and would be useful to the jury. We conclude that the District Court did not abuse its discretion in this regard.

IV. CONCLUSION

For the reasons stated above, we affirm the judgment of the District Court.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 05-3433

[Filed June 16, 2006]

KAKKADASAN SAMPATHACHAR)
)
v.)
)
FEDERAL KEMPER LIFE)
ASSURANCE COMPANY,)
Appellant.)

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
District Court Judge: The Honorable Juan R. Sanchez
(Civil. No. 03-05905)

Before: AMBRO, FUENTES, and GREENBERG, Circuit Judges.

JUDGMENT

This cause came on to be considered on the record from the United States District Court for the Eastern District of Pennsylvania and was argued on June 7, 2006.

On consideration whereof, it is now hereby ADJUDGED and ORDERED that the judgment of the District Court entered June 22, 2005 be, and the same is, hereby AFFIRMED. All of the above in accordance with the opinion of this Court.

DATED: June 16, 2006

Attest:

/s/Marcia M. Waldron
Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

NO. 03-5905

[Filed April 29, 2005]

KAKKADASAN SAMPATHACHAR	)
	)
v.	)
	)
FEDERAL KEMPER LIFE	)
ASSURANCE COMPANY et al.	)
	)

CIVIL JUDGMENT

Before the Honorable Juan R. Sánchez

AND NOW, this 25th day of April, 2005, in accordance with the verdict of the jury,

IT IS ORDERED that Judgment be and the same is hereby entered in favor of the Plaintiff and against Defendant Federal Kemper Life Assurance Company on Count 1 with interest to be calculated at the applicable rate from the date due proof of death was presented and for the Defendant Federal Kemper Life Assurance Company and against Plaintiff on Count 2.

BY THE COURT

ATTEST:

/s/_____
Nancy E. DeLisle
Deputy Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

NO. 03-5905

[Filed April 29, 2005]

KAKKADASAN SAMPATHACHAR	)
	)
v.	)
	)
FEDERAL KEMPER LIFE ASSURANCE COMPANY et al.	)
	)

VERDICT SLIP

Claim Under Insurance Policies

1. Do you find by a preponderance of the evidence that Pannathpur Jayalakshmi Sampathachar is dead?

_____Yes _____No

2. Do you find by a preponderance of the evidence that Plaintiff submitted due proof of his wife's death to the defendants?

Defendant Federal Kemper _____Yes

_____No

Defendant American General _____Yes

_____No

If you answered "Yes" to Questions 1 and 2, please proceed to answer the remaining questions. If you answered "No", have the foreperson sign below and contact court personnel.

Bad Faith Claim

3. Do you find by clear and convincing evidence that either or both of the Defendants acted in bad faith toward the Plaintiff in its consideration of the claims for the payment of death benefits due under the insurance policies issued by the Defendants upon the death of Pannathpur Jayalakshmi Sampathachar?

Defendant Federal Kemper _____Yes

_____No

Defendant American General _____Yes

_____No

4. If you answered Question No. 3 "Yes" for either defendant, do you find that:

a. Plaintiff is entitled to interest in an amount equal to the prime rate of interest plus 3% on the amount of the claim from the date it was made?

Defendant Federal Kemper _____Yes

_____No

Defendant American General _____Yes

_____No

b. Plaintiff is entitled to punitive damages?

Defendant Federal Kemper _____Yes

_____No

Defendant American General _____Yes

_____No

c. Plaintiff is entitled to reimbursement of his costs and attorneys' fees?

Defendant Federal Kemper _____Yes

_____No

Defendant American General _____Yes

_____No

5. If, for either or both of the defendants, you answered "Yes" to Question 4.b., state the amount of punitive damages to which Plaintiff is entitled:

Defendant Federal Kemper $_____

Defendant American General $_____

Please have the foreperson sign below and contact court personnel.

_____

Foreperson of the Jury

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

NO. 03-5905

[Filed April 13, 2005]

KAKKADASAN SAMPATHACHAR	)
	)
v.	)
	)
FEDERAL KEMPER LIFE	)
ASSURANCE COMPANY et al.	)
	)

ORDER

AND NOW, this 12th day of April, 2005, it is hereby ORDERED that Defense objections to the word AIG in voir dire question 4.b. and the locations in voir dire question 5 are SUSTAINED. Defense objection to voir dire question numbered nine is SUSTAINED and the question is excluded. Plaintiff's objection to the last sentence of voir dire question 12 is SUSTAINED.

Plaintiff's Motion to Quash is reserved until prior to the witness's testimony; counsel are advised not to mention the issue during opening statements. Evidence of other insurance

policies is ADMITTED but LIMITED to the number of policies and the dollar amounts; evidence regarding the applications for those policies or the status of those policies is EXCLUDED.

It is further ORDERED that Plaintiff's objection to Defendant's first verdict slip query is SUSTAINED, Plaintiff's burden of proof remains solely that the insured is dead by a preponderance of the evidence. Other objections to the verdict slip and proposed points for charge are RESERVED until the charging conference prior to closing arguments.

BY THE COURT:

/s/_____
Juan R. Sánchez, J.

Supreme Court, U.S.
FILED
SEP 28 2006
OFFICE OF THE CLERK

(2)

No. 06-375

IN THE

Supreme Court of the United States

FEDERAL KEMPER LIFE ASSURANCE COMPANY,

Petitioner,

v.

KAKKADASAN SAMPATHACHAR,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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COUNTER STATEMENT OF QUESTION PRESENTED

Has the Petitioner presented compelling reasons for granting a petition for a writ of certiorari to review the application of Fed. R. Civ. P. 49(a) to the facts of this case, where (a) Pennsylvania law applied to this case and provided that one of the three issues of fact that a plaintiff asserting a breach of a life insurance contract must establish is the death of the insured, (b) the special verdict form the district court approved, and the Third Circuit upheld on appeal, asked the jury to determine whether the insured had died, (c) the Third Circuit's decision is not in conflict with any decision of another United States court of appeals or this Court, and (d) the Third Circuit has not departed from accepted or usual course of judicial proceedings?

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Effect Of Failure Of Special Verdict Or Special Finding To Include Findings Of All Ultimate Facts Or Issues, 76 A.L.R. 1137 (1932) 10

COUNTERSTATEMENT OF THE CASE

The Third Circuit's Opinion correctly summarized the general factual background and procedural history.

A. The District Court Posed A Special Verdict Interrogatory On The Elements Of Life Insurance Claims Under Pennsylvania Law.

Under Pennsylvania law and the insurance policy at issue, Dr. Sampathachar had to prove that (1) his wife, Jaya Sampathachar, was probably insured by the defendant insurance companies for the amounts claimed, (2) she probably died, and (3) due proof of her death was probably submitted to the insurance companies. *Ondo v. Greek Catholic Union of Russian Brotherhoods of U. S. A.*, 38 A.2d 370, 371 (Pa. Super. 1944) ("plaintiff established a prima facie case by proving that a certificate of insurance had been issued to her decedent, the by-laws, the death, and that proofs of death had been furnished the Union."); 40 P.S. § 510 ("a policy shall become a claim by the death of the insured. . . .") Neither the existence of insurance coverage for Jaya, nor the adequacy of the proof of death submitted to the insurer (a notice-of-claim requirement met by submitting a claim form and death certificate), are issues preserved on this appeal. The special verdict form asked the jury to determine whether Dr. Sampathachar had proven the factual issue of his wife's death and the jury so found.

B. Dr. Sampathachar Proved His Wife's Death By Varied And Voluminous Evidence Presented At Trial.

Dr. Sampathachar proved the death of his wife Jaya, the insured, by circumstantial evidence that Jaya probably committed suicide (an insured risk) or otherwise drowned

in the Ganges River, and by direct evidence of the identification of the body and the resulting issuance of a death certificate following a police investigation. The circumstantial evidence was that Jaya had been depressed and had expressed suicidal ideation for several years prior to 2001; this suicidal depression was occasioned by the death in 1995 of her religious guru and "adoptive" son; she had established charitable and religious institutions in the guru's memory that she wished to endow; she believed suicide in the Ganges River, along with endowing her religious charities, would reunite her with her "son" in heaven; she purchased large insurance policies on her life contemporaneously with the onset of her depression and the creation of her charities; she gave her executor, Dr. Sampathachar, precatory instructions to use the proceeds of her estate — including insurance proceeds of which he was the beneficiary — to endow the charities and, thus, ensure her salvation; she disappeared from home without explanation and went on a religious pilgrimage to holy sites in the north of India where the Sampathachars had no ties and did not speak the local language; her diary, which was found during a police investigation, stated her intent to commit suicide by drowning herself in the Ganges; she left her hotel room telling the clerk she was going to a holy site on the Ganges (the "Sangam"); the police investigators found a witness, a priest, who saw her at the Sangam the day she left her hotel or the following day; the Sangam of the Ganges (the confluence of swift tributaries falling from the Himalayas) is a dangerous location where drownings frequently occur; Jaya's slippers were found at the Sangam, on the steps leading to the water; she has not been seen since she went to the Sangam; and despite the insurance investigator's very diligent efforts (employing at least nine different agencies on three continents), *no trace* of this elderly

professional woman who had lived a narrow life devoted to her family ties and religious commitments has been found.

The direct evidence of Jaya's death was the positive eye-witness identifications of the body by Dr. Sampathachar; by Jaya's nephew, Raghavendra; and by his father and her 80-year old brother, Anandathirta, neither of whom were beneficiaries of her estate. Immediately after the police in northern India called him about Jaya's disappearance from her hotel, Dr. Sampathachar sent first a nearby relative in Bangalore, and then his nephew Raghavendra in Dehli, to conduct a search of pilgrimage sites in the north where Jaya might be found. Both searchers widely published photographs of Jaya and involved the police in their search, confounding the insurer's insinuations of fraud. Raghavendra eventually gave photographs to river rafters who, in his absence, found Jaya's body in the Ganges and tentatively identified it from the photograph. Raghavendra confirmed that identification. The rafting company outfitter and Raghavendra testified that the body was identifiable when brought to shore. The investigating police officer (to whom Raghavendra had given a photograph) testified that the body was identifiable many hours after being taken from the frigid river, though he could not identify her because she was a stranger to him. Anandathirta, Dr. Sampathachar and the medical examiner, Dr. Saklani, all testified that the body was still identifiable when they first saw it over 24 hours after it was removed from the river. Jaya's 80 year old brother was emphatic on his identification. The body was dressed in the distinctive, ascetic costume of white garments that Jaya wore, and it had no jewelry contrary to local custom, as noted by the police investigator. The body had the same age and physiognomy as Jaya and resembled her, and the body lacked a uterus, as did Jaya. The jury itself compared photographs of Jaya to

those of the body taken at the autopsy conducted the day after the body was recovered.

The insurer challenged the reliability of the identification of the body recovered in recognizable state from the Ganges principally on the strength of a discrepancy in the tooth count by the general surgeon. The number of teeth matched Jaya's records, but two teeth on the autopsy chart were varied in placement from Jaya's records. The surgeon, Dr. Saklani, had no recollection of the body apart from his records. He had no pathology training. He conducted the entire autopsy in 30-45 minutes after his regular day's work, without equipment, in a dim, primitive shed that the jury saw in photographs, without even fluorescent lighting. Dr. Saklani testified that his only object in conducting the autopsy was to determine the cause of death, which he found to be drowning. The insurer's own pathology expert suggested that Dr. Saklani got the cause of death wrong, and that he erred in numerous other ways. Accordingly, she all but demolished her principal's contention that Dr. Saklani's hurried tooth count proved that the body recovered from the Ganges "could not have been" Jaya's. A forensic dentist testifying for Dr. Sampathachar also opined that the tooth count was unreliable. She explained that the initial tooth counts at the 9/11 crash site at Shanksville, Pennsylvania, conducted by non-forensic volunteer dentists, were so rife with error that she and her trained forensic team just started over when they arrived on scene; and she found errors in the records of each of Jaya's American dentists who were, of course, (1) trained dentists (2) working in orderly, equipped offices (3) whose purpose was dentistry not verifying an apparent drowning.

C. The Insurer Claims A "Right" To Pose A Jury Interrogatory On An Evidentiary Dispute About the Cause And Manner Of Jaya's Death When Only The Fact of Her Death Was A Material Issue of the Claim Presented.

The interrogatory the jury answered correctly posed the factual elements of the cause of action on which Dr. Sampathachar bore the burden of proof under Pennsylvania law. The insurer vigorously challenged Dr. Sampathachar's proof of death at trial and argued to the jury in closing that Dr. Sampathachar's evidence did not establish that the body recovered from the Ganges was his wife's. The jurors were less impressed with the insurer's evidentiary challenge than it thinks they should have been, since they found Jaya was dead based on all the evidence presented.

The insurer contends that Federal Rule of Civil Procedure 49 was violated, and its Seventh Amendment right to a trial by jury thereby infringed, because the verdict slip only asked the jury to decide the fact at issue in the claim, namely, had the insured died? The insurer wanted an additional special interrogatory asking whether Dr. Sampathachar proved the cause and manner of the deceased's death (*i.e.*, "that the body recovered from the Ganges River on November 6, 2001, was his wife's body"). While Pennsylvania law requires only that the plaintiff prove to the jury that the insured had died, the insurer contends that it had a "right" to follow-up its closing argument with an advocacy interrogatory designed to focus the jury's attention on one of numerous evidentiary disputes at trial.

REASONS FOR DENYING THE PETITION

The petition should be denied because it satisfies none of the criteria set forth in this Court's Rule 10 governing review on *certiorari*. Moreover, the district court and the Third Circuit correctly interpreted and applied Rule 49(a).

I. PETITIONER FAILS TO SATISFY ANY OF THE CRITERIA FOR CERTIORARI.

A. There Is No Conflict Between Or Within The Circuit Courts.

The insurer's petition ignores Supreme Court Rule 10(a). It does not allege that any court of appeals has ever entered a decision in conflict with the Third Circuit on the question presented. Furthermore, it admits that, subsequent to the adoption of the Federal Rules of Civil Procedure in 1937, no court has ever adopted — or considered — the interpretation of Rule 49 that petitioner urges upon the Court as a reason to grant *certiorari*.

B. There Was No Departure From The Accepted And Usual Course Of Judicial Proceedings.

The petitioner appears to contend that the Third Circuit's decision calls for an exercise of this Court's supervisory power. However, it does not allege the necessary prerequisites for such contention: that the Third Circuit departed from the accepted and usual course of judicial proceedings or sanctioned such departure by the district court. On the contrary, the insurer admits that the Third Circuit and the district court here followed the accepted and usual course of judicial proceedings. Petitioner challenges the accepted and

usual course of judicial proceedings, urging a "return" to the insurer's view of procedural law of the 18th and 19th century. According to the insurer, *certiorari* should be granted because all courts in all jurisdictions have been so wrong for so long that Supreme Court supervision is now required. Besides being wrong, that is not a recognized basis for granting *certiorari.*

II. THE DISTRICT COURT AND THE THIRD CIRCUIT CORRECTLY INTERPRETED AND APPLIED RULE 49, AND THE DECISIONS OF THIS COURT PREDATING ADOPTION OF THE RULES OF CIVIL PROCEDURE ARE NOT TO THE CONTRARY.

A. There Is No Conflict Between The Third Circuit's Application Of Rule 49 And Any Decision By The Court.

Petitioner does not allege that the Third Circuit decided an important federal question in a way that conflicts with relevant decisions of this Court. Instead, petitioner admits there has never been a relevant decision of this Court that relates to, much less supports, its contention that Rule 49(a) entitles a litigant to a special jury interrogatory on an evidentiary dispute that is not a material element of the state law claim on which the opposed party bears the burden of proof at trial. The insurer claims that superseded procedural decisions prior to the 1937 adoption of the Federal Rules of Civil Procedure entitled it to a specific jury interrogatory on whether Dr. Sampathachar proved the cause and manner of his wife's death. It argues that an evidentiary dispute on that issue was relevant to determining whether Jaya had died and, therefore, the jury had to determine more than the fact of her

death. Petitioner is mistaken, and none of the superseded cases of this Court that the insurer cites support its argument.

In *Patterson v. United States*, 15 U.S. 221 (1817), a jury was charged under the pleadings with determining *only* whether a "certificate, and other proofs required by law . . . were produced at the [tax] collector's office at Baltimore . . ." However, the verdict "did not find *the matter in issue* one way or the other." *Id.* at 224 (emphasis added). On the contrary, the jury pierced through the writ-pleading technicalities to decide that "the bond . . . is the deed of the defendant, and that there is justly due to the United States, upon the said bond, a certain sum of money." *Id.* This Court held that the jury verdict was a nullity because the jury decided an issue *other than* "the point in issue" under the pleadings (whether proofs were produced at the collector's office by a certain date). The correct analogy to *Patterson* is that the jury here could not render a verdict on whether the plaintiff proved any particular cause or manner of death (i.e., "that the body recovered from the Ganges River on November 6, 2001, was his wife's body") when, under the applicable state law, his burden was only to prove her death. The fact that Dr. Sampathachar's evidence of his wife's death included, *inter alia*, evidence that her body was recovered from the Ganges River on November 6, 2001, does not entitle a jury to base a verdict on whether that cause and manner of death were proved. Under *Patterson*, a jury's special verdict should address the material element of the claim to be proved, not any one of the many evidentiary disputes relating to that material element.

The insurer has likewise misunderstood each of the other ancient cases on which it relies. *See Barnes v. Williams*, 24 U.S. 415 (1826) (special verdict failed because it did not

decide an essential factual element of the legal claim — executor consent to a bequest of slaves — and of a statute of limitations defense); *Barnes v. Williams*, 24 U.S. 415, (1826) (under the Wisconsin procedure applied by the federal trial court, a judgment in favor of an alleged assignee of converted grain was deficient because the jury never decided that the plaintiff had actually been assigned the original creditor's interest in the wheat, which was a necessary factual issue on which the plaintiff had the burden of proof); *Ward v. Cochran*, 150 U.S. 597 (1893) (under the Nebraska special verdict statute that the federal trial court applied — which specifically provided for a verdict on "the facts as established by the evidence, *and not the evidence to prove them* . . ." — a special verdict failed to decide whether the defendant's possession was actual and exclusive, which was a necessary factual element of the legal defense of adverse possession) (emphasis added); *United States v. Esnault-Pelterie*, 299 U.S. 201, 205 (1936) (the Court of Claims failed in its duty under then-current procedures to decide "[v]alidity and infringement [that] are ultimate facts on which depends the question of liability" through "a special verdict and specifically to set forth the ultimate facts; *the evidence is not brought up*" [it was the court, not a jury, that failed to satisfy the verdict-without-addressing-evidence requirement, notwithstanding that it also issued findings of fact and conclusions of law]) (emphasis added).

The procedural cases this Court decided prior to the adoption of the Federal Rules of Civil Procedure hold that a special jury verdict must hew to the "issue in question" under the pleadings or applicable law. Two of the insurer's cases expressly state that special jury verdicts cannot address evidentiary disputes, but must instead decide whether the material elements of the cause of action were proven based

upon the totality of evidence. The insurer either fails to understand, or simply ignores, that clear teaching.[1]

> The general rule [in the early cases] is that a special verdict, in order to be good, must contain a finding on all the material facts or issues essential *to support the judgment*. (Otherwise, as is pointed out in many of the cases, the verdict is defective, and a judgment rendered thereon will be set aside as not supported by the findings.)

Effect Of Failure Of Special Verdict Or Special Finding To Include Findings Of All Ultimate Facts Or Issues, 76 A.L.R. 1137 (1932) (emphasis added). This Court set aside judgments only because the jury either failed to decide one or more of the material elements of the cause of action, or decided some issue other than the material elements to be proved. Judgment in the case at bar was properly entered and affirmed because the jury here *did* decide the issue of death, and the jury was properly not asked to determine any evidentiary issue including, without limitation, determination of whether Dr. Sampathachar proved the specific cause and manner of Jaya's death.

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1. If it were otherwise, then in the instant case, the plaintiff could have insisted that the special verdict include any number of disputed evidentiary disputes, such as whether Dr. Sampathachar, Raghavendra and Anandathirta identified the body the rafters found in the Ganges as Jaya's; whether Jaya intended to commit suicide, as she wrote in her dairy; whether the Sangam, where she was last seen alive, is a dangerous locale where many devout Hindus who take a dip are swept away; and whether the insurance investigators failed to find the slightest trace of evidence that Jaya was alive after October, 2001, despite their diligent efforts over several years. Those questions about evidence of the circumstances of Jaya's death are no less relevant to the proof of death than the insurer's questions about Dr. Sampathachar's evidence of the cause and manner of death.

B. There Is No Merit To Petitioner's Constitutional Argument, Which It Failed To Preserve For Appeal In Any Event.

Petitioner argues for the first time in its petition that it was deprived of its Seventh Amendment right to a trial by jury because it was denied the "right" to a jury decision on an evidentiary dispute that it pursued at trial and argued in closing argument. Insofar as respondent understands this contention, it is entirely dependent upon the premise that the common law once acknowledged a litigant's right to pose special verdict advocacy interrogatories on disputed evidence. In fact, just the opposite was true. The common law rigorously required that special jury verdicts address the material elements of a claim on which any party bore the legal burden of proof. The insurer claims to have been deprived of a constitutional right that neither this Court, nor any other court in any jurisdiction, has ever recognized. In any event, petitioner never presented this argument before the district court or the Third Circuit, so it failed to preserve the issue.

CONCLUSION

For all the foregoing reasons, the Court should deny the petition.

Respectfully submitted,

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